

EXHIBIT 2

To the Declaration of
Rakesh N. Kilaru

BARBARA OSBORNE Network Strictly Confidential
HOUSE AND PRICE vs NCAA

June 15, 2023

1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

GRANT HOUSE and SEDONA PRICE,)
on behalf of themselves and)
all others similarly situated,)
Plaintiffs,) Civil Action No.
v.) 4:20-cv-03919-CW
NATIONAL COLLEGIATE ATHLETIC)
ASSOCIATION; PAC-12 CONFERENCE;)
THE BIG TEN CONFERENCE, INC.;)
THE BIG TWELVE CONFERENCE,)
INC.; SOUTHEASTERN CONFERENCE;)
and ATLANTIC COAST CONFERENCE,)
Defendants.)

** NETWORK STRICTLY CONFIDENTIAL **

VIDEO DEPOSITION OF BARBARA OSBORNE
June 15, 2023, 9:41 a.m. CST
150 North Riverside Plaza
Chicago, Illinois 60606

Job No. J9780979

1 THE VIDEOGRAPHER: Good morning. We are
2 now on the record. The time is now 9:41 a.m.
3 Central Standard time. Here begins Media No. 1 on
4 the videotaped deposition of Barbara Osborne.

5 Today's date is June 15, 2023, taken in
6 the matter of In Re College Athlete NIL Litigation
7 filed in the United States District Court,
8 Northern District of California, Oakland Division.
9 Case number is 4:20-CV-03919.

10 My name is Gabriel Martin, and I'm the
11 videographer. The court reporter today is
12 Cynthia Conforti, both with Esquire Deposition
13 Solutions.

14 Will the reporter please swear in the
15 witness.

16 (Witness sworn.)

17 BARBARA OSBORNE,
18 having been duly sworn, was examined and testified
19 as follows:

20 EXAMINATION

21 BY MR. SIEGEL:

22 Q Good morning, Professor Osborne. Good
23 morning.

24 A Morning.

25 Q My name is Ben Siegel of the law firm

1 be implicated, and the schools would have to be
2 concerned about that because they're the ones that
3 have to comply with Title IX.

4 MS. CAPPS: Objection, form.

5 THE WITNESS: Yes, that is true, that the
6 schools would have to be concerned about this, and
7 it would, if applied.

8 BY MR. SIEGEL:

9 Q And it would implicate their own Title IX
10 responsibilities, correct?

11 A It has a dramatic impact on their own
12 Title IX responsibilities, yes.

13 Q Okay. It implicates them. You don't like
14 the word "implicate"? I mean, I'm --

15 A Yes.

16 Q Okay. I don't think it's controversial.
17 It's part of your opinion. But anyway...

18 MS. CAPPS: Objection, form.

19 BY MR. SIEGEL:

20 Q That was the hardest paragraph, I have to
21 admit, to discuss with you. So I'm glad we got
22 through it.

23 MS. CAPPS: Objection, form.

24 BY MR. SIEGEL:

25 Q In paragraph 31, please, if you look at

1 that, can you read that to yourself quickly?

2 Okay. And I'm mainly going to focus you
3 on the first sentence.

4 As expressed in the first sentence, in
5 this paragraph, again, assessing the broadcast NIL
6 model in your view, the facts and law, your
7 opinion is that the model is a, quote, violation
8 of the Title IX regulations and policy
9 interpretation sections governing the provision of
10 financial assistance.

11 Is that true?

12 MS. CAPPS: Objection. Objection, form.

13 THE WITNESS: Yes.

14 BY MR. SIEGEL:

15 Q Okay. And that's one of the opinions
16 you're offering in this case?

17 A Yes.

18 Q Okay. If you just turn the page to
19 paragraph 32. Just read that to yourself again,
20 please.

21 A I'm done.

22 Q Okay. Here, you know, again, assessing
23 the broadcast NIL model and your view of the facts
24 of the law, you opine what you term as the, quote,
25 payment scheme as a violation of Title IX,

1 correct?

2 A If I were conducting an audit.

3 Q Okay. Again, if you were looking at this
4 payment scheme and I were asking you,
5 Professor Osborne, do you believe it's a violation
6 of Title IX, would that be your opinion?

7 MS. CAPPS: Objection, form.

8 THE WITNESS: So for -- in my report I
9 state that I would flag it as a violation if I
10 were conducting an audit.

11 BY MR. SIEGEL:

12 Q Okay. But what if you were not conducting
13 an audit? What if the Court were asking you:

14 Based on the review that you -- that you
15 conducted, Professor Osborne, do you believe that
16 the payment scheme is a violation of Title IX?

17 MS. CAPPS: Objection to form.

18 THE WITNESS: So, my -- I'm -- my job is
19 not to offer a legal opinion.

20 My job is to provide an expert opinion
21 related to how this all works and Title IX. So I
22 would -- I -- as I said, that if I'm conducting an
23 audit, I would say that this is something that
24 would be a violation of Title IX.

1 BY MR. SIEGEL:

2 Q But if you were -- if you did the exact
3 same analysis not in the context of an audit, but
4 if you looked at the same materials, did the same
5 analysis that you did for the purposes of this
6 report and you were asked to opine as to whether
7 the payment scheme is a violation of Title IX,
8 would that be your opinion?

9 MS. CAPPS: Objection, form, calls for a
10 legal conclusion -- opinion.

11 THE WITNESS: So, again, I think the words
12 matter. I'm not offering a legal opinion in this
13 report.

14 What I am is offering the opinion of
15 someone who is an expert in Title IX about how
16 Title IX would be implicated in this process --

17 BY MR. SIEGEL:

18 Q Okay. Well, you know, I guess we do have
19 disagreement here, and it's fair to say that.

20 I'm just trying to understand what you did
21 here was looked at the broadcast NIL model, looked
22 at -- looked at the facts, read depositions, and
23 then came to this conclusion that you would flag
24 the payment scheme as a violation of Title IX?

25 MS. CAPPS: Objection, form.

1 BY MR. SIEGEL:

2 Q Isn't that -- isn't that the conclusion
3 that you reached?

4 MS. CAPPS: Same objection.

5 THE WITNESS: Yes. I said I would flag it
6 as a violation of Title IX, but I'm not offering a
7 legal opinion. I'm providing all of the
8 information for the Court to be able to find an
9 opinion.

10 BY MR. SIEGEL:

11 Q Okay. So is using the word "opinion" the
12 problem? I mean, opinion -- your view, your
13 opinion, your belief is that the payment scheme is
14 a violation of Title IX, correct?

15 MS. CAPPS: Objection to form.

16 THE WITNESS: Okay. My -- my personal
17 belief is that this is. But, again, I want to
18 state that I am not -- this report is not my legal
19 opinion.

20 BY MR. SIEGEL:

21 Q Okay. I dis- -- I mean, obviously I
22 disagree with that. But because -- well, you're
23 saying not just your personal opinion because
24 that's what you want it to be. It's your personal
25 opinion because as an expert in Title IX, when you

1 Q Has any U.S. body with legal authority
2 ever found a school liable under Title IX because
3 of the actions of the conferences under which it
4 was a member?

5 A Not to the best of my knowledge.

6 Q Okay. Yet this is one of your opinions,
7 as you just stated, based on your application of
8 your view of the facts in this case as applied to
9 Title IX statute, its governing regulations --

10 MS. CAPPs: Objection, form.

11 BY MR. SIEGEL:

12 Q -- that -- guidance letters and other
13 administrative guidance, correct?

14 MS. CAPPs: Objection, form, asked and
15 answered.

16 THE WITNESS: Yes, I conclude that this
17 model would be implicated by Title IX that I --
18 I'm not aware of anything else because that model
19 that is proposed by Mr. Rascher did not exist
20 until he created it.

21 BY MR. SIEGEL:

22 Q Okay.

23 A So --

24 Q But there hasn't been any case that's ever
25 found a school --

1 MS. CAPPAS: Can you let her finish her
2 answer? She was still speaking.

3 BY MR. SIEGEL:

4 Q Were you finished?

5 A No, I wasn't.

6 Q Okay. Go ahead.

7 A So Mr. Dascher created the model --

8 Q Rascher.

9 A Rascher. I'm sorry.

10 Mr. Rascher created the model. My job was
11 to evaluate that model which didn't exist on the
12 face of the Earth before he created it.

13 Under those circumstances, I believe that
14 because of these principles, Title IX applies to
15 that model.

16 Q Okay. But as you just stated, there's
17 never been a case in the history that you're aware
18 of that for any reason has ever applied Title IX
19 to the schools because of the actions of their
20 conferences, correct?

21 A Yes. But there's also never been in the
22 history of anything a situation where conferences
23 were --

24 Q There's never been --

25 A -- behaving in the way that they --

1 MS. CAPPs: Please let her finish.

2 THE WITNESS: -- would be required to
3 behave under this model.

4 MR. SIEGEL: Yeah. I did ask a yes-or-no
5 question.

6 BY MR. SIEGEL:

7 Q But conferences do things all the time,
8 right? They do things -- conferences take lots
9 and lots of actions.

10 MS. CAPPs: Objection, form.

11 THE WITNESS: Conferences do take lots and
12 lots of actions, yes.

13 BY MR. SIEGEL:

14 Q And there's never been an allegation that
15 because of something that a conference did, a
16 schools Title IX liability was triggered, correct?

17 MS. CAPPs: Objection, form, asked and
18 answered.

19 THE WITNESS: I -- yes, that is correct.

20 BY MR. SIEGEL:

21 Q Okay. All right. And I'd like to go
22 through some of these factors in paragraph 78 that
23 you identify.

24 So looking at page 30 in paragraph 78, I'm
25 focused on A, but I think you explain that in more

1 detail on page 31, Section A.

2 A Okay.

3 Q Okay. You say that one -- one factor for
4 this conclusion that we just discussed is that
5 conferences are governed and controlled, in your
6 opinion, by a board of directors and composed of
7 representatives of member institutions. Correct?

8 A Yes.

9 Q Okay. And, again, you didn't cite any
10 legal authority holding that this makes schools
11 liable for the actions of conferences, did you?

12 MS. CAPPS: Objection, form.

13 THE WITNESS: No.

14 BY MR. SIEGEL:

15 Q Okay. Are you an expert in entity law?

16 A Can you tell me what entity law is?

17 Q Like corporations law.

18 A Oh, I -- no, I'm not an expert in
19 corporate law, no.

20 Q Are you an expert in piercing the
21 corporate veil?

22 A I'm not an expert in that area, no.

23 Q Okay. And for factual support for this
24 proposition, you cite only the declarations of
25 conference and school officials and the conference

1 THE VIDEOGRAPHER: We are back on the
2 record at 12:38 p.m.

3 BY MR. SIEGEL:

4 Q Good afternoon, Professor Osborne.

5 I'd like to direct your attention to one
6 of the sections that makes up Part V, and I am
7 going to skip ahead to Section 5(c) on page 42.

8 Are you there?

9 A Yes.

10 Q Okay. So in this section, you discuss
11 first the financial assistance requirements of
12 Title IX, correct?

13 A Yes.

14 Q Okay. And you conclude on page 42, and
15 then continuing on in that subsection, that
16 Professor Rascher's broadcast NIL model, among
17 other things, implicates the financial assistance
18 requirements under Title IX, right?

19 A Yes.

20 Q Okay. And you write in paragraph 110, if
21 you just -- don't mind, it's on page 44.

22 The regulations' provision on athletic
23 scholarships are distinct from the regulations'
24 provisions on general "financial assistance" but
25 are instructive as to how Title IX compliance

1 would be measured for the broadcast payment
2 payments.

3 Do you see that?

4 A For the broadcast model payments, yes.

5 Q Broadcast model payments, sorry.

6 Is that -- is that an accurate statement
7 of your opinion also as you sit here today?

8 A Yes.

9 Q Okay. Do you cite any legal authority to
10 support that conclusion that they're instructive?

11 A No, I don't.

12 Q Okay. Are you aware of any court cases
13 that have adopted that position?

14 A No, I don't, because no court cases have
15 had to look at this model.

16 Q Okay. The basis for your conclusions that
17 the regulations' provisions on athletic
18 scholarships are instructive as to how the Title
19 IX compliance would be measured for broadcast
20 payments, the ones that plaintiffs propose, is
21 based on your interpretation of the regulations as
22 applied to the facts of the case, correct?

23 A Yes, but I think that those are the same
24 as anybody who looks at Title IX would apply it.

25 Q Any layperson off the street?

1 A Any person who is required to follow the
2 regulations.

3 The reason I conclude this is because you
4 have the final -- financial assistance regulation
5 in general. Financial aid is a subsection of
6 that. And then you have the athletics-specific
7 reg- -- explanation, right? And so because we're
8 applying this to an athletics situation, I think
9 it's reasonable to apply the framework that's
10 provided in the athletics section to this
11 proposal.

12 MR. SIEGEL: I appreciate that, but I move
13 to strike that answer as nonresponsive.

14 BY MR. SIEGEL:

15 Q Really, I understand that you want to give
16 your explanation, but your -- the time to give an
17 explanation is here in the report or in direction
18 response to my questions or if your lawyers want
19 to ask you -- your lawyers are entitled to ask you
20 questions at the end of today. They may choose
21 to, they may choose not to.

22 But if they ask you: Professor Osborne
23 explain your opinion, then -- that's when you're
24 entitled to do it or if you get an opportunity to
25 write another report or if you're testifying in

1 Q Mm-hmm.

2 A -- the institution can just fix that by
3 providing an equal amount on the other side.

4 Q Could they?

5 MS. CAPPS: Objection, form.

6 BY MR. SIEGEL:

7 Q Hypothetically?

8 A Hypothetically, it's possible.

9 Q There's no legal -- I'm saying it's not --
10 it wouldn't be -- it wouldn't be -- it wouldn't be
11 illegal to do that?

12 MS. CAPPS: Objection, form, calls for a
13 legal conclusion.

14 THE WITNESS: It would not be a violation
15 or it wouldn't be illegal as far as I know. But
16 that's not Rascher's model.

17 BY MR. SIEGEL:

18 Q Okay. Does Rascher's model say anything
19 about what schools or conferences can or cannot
20 provide outside of what his model provides?

21 A No. Rascher's model says what needs to be
22 provided, and his model provides an enormous
23 amount of benefit to men and a teeny-tiny little
24 benefit to women.

25 Q Well, it's not what needs to be provided.

1 He is predicting what he believes the but-for
2 world would have looked like. It's not his
3 personal -- it's not his personal opinion. It's
4 his expert opinion about what the but-for world
5 would have looked like and how damages --
6 specifically in this case, his -- his model was
7 for modeling past damages, not how things should
8 be moving forward but modeling past damages,
9 correct?

10 A Right. And in his but-for world, he based
11 that on an economic opinion and not on the
12 regulatory landscape that institutions have to
13 comply with. And he also said in his deposition
14 that he did not consider Title IX.

15 Q The question is -- is whether or not his
16 model says that, you know, that there can't be
17 other funds provided by whomever, whether it be a
18 private donor, a conference, or a school, in
19 addition to how damages are allocated according to
20 his model. Does he say anything like that?

21 MS. CAPPS: Objection, form.

22 THE WITNESS: No, he -- he presents his
23 model, and is limited to just what he says in his
24 model.

1 BY MR. SIEGEL:

2 Q Okay. And -- okay. I'm going to ask you
3 to turn to page -- page 47.

4 Okay. In this section, you talk about --
5 your opinion that the broadcast model directly
6 implicates the equitable treatment provisions.

7 Do you see that?

8 A Yes.

9 Q Okay. And you conclude in this section
10 that the plaintiffs' broadcast model violates
11 Title IX's equitable treatment provisions,
12 correct?

13 A Correct.

14 Q And you cite Federal Regulation
15 34 C.F.R. § 106.41(c) and the policy
16 interpretation 7(b)(2) for this conclusion; is
17 that correct?

18 A Yes.

19 Q Okay. So, again, has your interpretation
20 of those provisions and how they would provide
21 here ever been endorsed by any court or other
22 legal authority?

23 MS. CAPPS: Object to form.

24 THE WITNESS: I -- so the general
25 financial assistance has been supported by many

1 courts.

2 BY MR. SIEGEL:

3 Q I mean, how -- how -- how it would
4 characterize -- how it would apply in this
5 particular situation.

6 A No, as, again, this particular situation
7 doesn't exist in the real world, so the Court
8 wouldn't have been able to --

9 Q Okay.

10 A -- have a case about it.

11 Q Okay. And outside of -- and outside of
12 your -- looking at these regulations, looking at
13 the model, looking at the background facts, did
14 you rely on any other peer-reviewed method for
15 this conclusion?

16 MS. CAPPS: Object to form.

17 THE WITNESS: Again, this is a brand-new
18 model, so there wouldn't have been anything out
19 there. I'm just applying the regular regulations
20 as it would fit the situation.

21 BY MR. SIEGEL:

22 Q Right, like any lawyer would do, correct?

23 MS. CAPPS: Objection, form.

24 THE WITNESS: Like any person working in
25 athletics would do; like any person who's

1 analyzing Title IX would do.

2 When I worked in college athletics, I had
3 to look at whether or not we were doing things.
4 It doesn't require me being a lawyer to do that.

5 BY MR. SIEGEL:

6 Q Doesn't -- so any -- so you're -- are you
7 saying that your qualifications as a law professor
8 and lawyer and a law professor who studied this is
9 not part of what qualifies you to give this
10 opinion?

11 A No --

12 MS. CAPPS: Objection, form.

13 THE WITNESS: -- I am saying that
14 everything about my background contributes to my
15 qualifications in -- in applying this, because
16 I've lived it as an athletic administrator; I've
17 studied it as a professor, and I've utilized my
18 lawyering skills when working for Ice Miller to
19 apply the law in that way. But --

20 BY MR. SIEGEL:

21 Q I'm not denying your credentials --

22 A Right.

23 Q Well, first of all, you were working --
24 you haven't worked at Brandeis since 1998?

25 A This is correct.

1 Q And that has Division III athletics.

2 There's not Division I athletics at that school,
3 correct?

4 A That is correct.

5 Q And no, there's no football program there,
6 correct?

7 A That is correct.

8 Q I'm not -- and I'm not disputing your
9 qualifications. I'm just -- I'm honestly curious
10 as to why you are denying the fact that as a law
11 professor who studies this and researches this and
12 teaches courses about it and does research about
13 it, that you're saying that you are not providing
14 a legal analysis that frankly could appear in a
15 law review article?

16 MS. CAPPS: Objection, form.

17 THE WITNESS: No, I think I conduct legal
18 analysis, absolutely, but my -- my report is not a
19 legal opinion. And you asked about my --

20 BY MR. SIEGEL:

21 Q If the broadcast model directly
22 implicates --

23 (Simultaneous speaking.)

24 MS. CAPPS: If you can let her finish your
25 question. She's been interrupted

1 three simultaneously times now.

2 BY MR. SIEGEL:

3 Q That the disproportionate of payments is a
4 violation of Title IX's equitable treatment
5 provisions, that's not a legal conclusion?

6 A Where are you at? I'm sorry.

7 Q On paragraph 118 --

8 A Okay.

9 Q -- in the last sentence, you said -- and
10 I'll be fair to you, you say fully:

11 I would flag these disproportionate
12 payments as a violation of Title IX's equitable
13 treatment provisions if I were conducting and
14 audit. Right?

15 A Right, I would "flag" it if I were
16 conducting an audit.

17 Q If you were conducting an audit, wouldn't
18 the client be asking you for your legal opinion
19 about whether or not those disproportionate
20 payments violate Title IX?

21 MS. CAPPS: Objection, form.

22 BY MR. SIEGEL:

23 Q Isn't -- isn't -- wouldn't that be the
24 purpose of your audit?

25 MS. CAPPS: Same objection, form.

1 THE WITNESS: The purpose of my audit,
2 when I've done audits -- again, I've done an audit
3 when I was an athletic administrator. I've done
4 audits as a consultant. So they're hiring me as a
5 consultant, not a lawyer.

6 BY MR. SIEGEL:

7 Q As a consultant who's a law professor,
8 who's -- who teaches courses and an expert in
9 Title IX --

10 A Right.

11 Q -- and has written extensively on it --

12 A Right. Right.

13 Q -- correct?

14 A And so I flagged those in an audit, and
15 it's up to the institution with what they want to
16 do with it. I'm not...

17 Q I understand, but if you were conducting
18 an audit, wouldn't it be -- you'd be using your
19 legal expertise to provide this opinion?

20 MS. CAPPS: Objection, form, asked and
21 answered.

22 THE WITNESS: My legal expertise is a part
23 of all of the expertise that I'm offering them,
24 yes.

1 BY MR. SIEGEL:

2 Q Okay. But you're still going to maintain
3 that -- that -- when you say here that these
4 disproportionate payments are a violation of
5 Title IX's equitable treatment provisions, that's
6 not a legal opinion?

7 MS. CAPPS: Objection, form, asked and
8 answered.

9 THE WITNESS: This full sentence says I
10 would flag these disproportionate payments as a
11 violation if I was conducting an audit --

12 BY MR. SIEGEL:

13 Q Right, but that's not a legal --

14 A -- that's -- that's providing -- that's --

15 MS. CAPPS: You're interrupting her again.
16 You're not allowing her to finish her answer.

17 THE WITNESS: That's -- I'm sorry.

18 MS. CAPPS: Please finish your answer.
19 Excuse me.

20 THE WITNESS: That's providing advice to a
21 school that asks you to do an audit.

22 BY MR. SIEGEL:

23 Q Okay. Last question:

24 And that advice is not in the form of a
25 legal opinion?

1 A No.

2 Q Okay.

3 A It's a consulting opinion.

4 Q Okay. So getting back to this question
5 about schools being liable for the actions of the
6 conferences under the broadcast model, I have a
7 question related to that.

8 If a conference in its broadcast agreement
9 gave more air time to men's sports, as opposed to
10 women's sports, would that implicate the schools'
11 Title IX obligations?

12 A No.

13 Q Why not?

14 A Because the broadcast air time is
15 controlled by a third party. But the revenue
16 payments that come back to the institution are
17 then used for the benefit of the entire program,
18 male and female athletes.

19 So the air time, which is response to a
20 market, as far as fan preference for watching some
21 games over other games, is what generates the
22 revenue in the broadcast rights agreement, but the
23 money that funnels back to the schools under
24 Title IX is a source of revenue, among many, that
25 has to be used in an equitable way within the

1 program.

2 Q So if in the broadcast agreement itself
3 the conference agreed that more air time would be
4 given to men's sports than women's sports, you
5 don't think that would implicate the schools'
6 Title IX obligations?

7 A No.

8 Q Okay. And what if in the broadcast
9 agreement the conferences agreed that more
10 publicity would be provided for promoting men's
11 athletic contests versus female athlete
12 contests --

13 MS. CAPPS: Objection, form.

14 BY MR. SIEGEL:

15 Q -- contests -- would that violate --
16 implicate the schools' Title IX obligations?

17 MS. CAPPS: Objection, form. Same
18 objection.

19 THE WITNESS: So the con- -- the
20 conference agreement with the broadcaster, you're
21 saying that that document provides more promotions
22 for men's events than women's events.

23 BY MR. SIEGEL:

24 Q Yeah, if that were true. Hypothetically.

25 A Hypothetically, if that were true, I still

1 MS. CAPPS: Objection, form.

2 THE WITNESS: I -- yes, I looked at the
3 broadcast model and applied Title IX, and so I
4 offered my opinion as whether or not Title IX
5 would be implicated by that model.

6 BY MR. SIEGEL:

7 Q Okay. And again, you're opining about
8 Dr. Rascher's class-wide methodology for awarding
9 past damages to Power Five Conference football and
10 men's and women's basketball players, right?

11 A Yes.

12 Q Okay. And, again, if you look at -- if
13 you look at your table of contents, Part V, one
14 conclusion is that plaintiffs' broadcast model
15 violates Title IX?

16 A Yes. I was going for a punchy headline.

17 Q And you succeeded.

18 And, again, you understand that
19 Dr. Rascher's broadcast NIL damages model, in his
20 class certification report, is designed to explain
21 to the Court, among other things, how plaintiffs
22 can prove past class-wide impact and measure past
23 damages to award damages to members of the Power
24 Five men's football and basketball class and
25 women's basketball class?

1 MS. CAPPS: Objection, form.

2 THE WITNESS: Yes, he --

3 BY MR. SIEGEL:

4 Q Okay.

5 A -- proposes that model.

6 Q And your report generally opines, if the
7 model was used as Dr. Rascher had designed it to
8 award past damages to these athletes, that it --
9 it would have implicated Title IX?

10 A Yes.

11 Q Okay. In doing -- in performing this
12 task, have you identified a single case in your
13 report where a Court held that to award damages to
14 a plaintiff or a group of plaintiffs would not be
15 permitted because it would violate Title IX?

16 A I am --

17 MS. CAPPS: Object to form.

18 THE WITNESS: -- not.

19 BY MR. SIEGEL:

20 Q I'm sorry. You're not aware, right?

21 A I am not aware.

22 Q Okay. You know, in fact, a Court has
23 never held that to be true, as far as you know,
24 correct?

25 A As far as I know, this sort of thing has

1 never been out there in the universe, and a Court
2 has never had to decide about it.

3 Q I just want to make it clear you
4 understand the breadth of what I'm asking --

5 A Uh-huh.

6 Q -- you, okay?

7 A Court has never held that to award
8 damages to a plaintiff or single plaintiffs,
9 whether or not to broadcast NIL damages or for any
10 other claim, would not be permitted because to
11 award damages in such a way would violate
12 Title IX.

13 MS. CAPPS: Objection, form.

14 BY MR. SIEGEL:

15 Q Is that true?

16 MS. CAPPS: Calls for a legal conclusion,
17 asked and answered.

18 THE WITNESS: I am not aware of any cases
19 that would have cited that, no.

20 BY MR. SIEGEL:

21 Q Okay. And what part of Title IX would
22 prohibit distribution of NCAA and conference funds
23 as damages to student-athletes as violative of
24 Title IX?

25 MS. CAPPS: Objection, form.

1 THE WITNESS: So I explained in my report
2 why I think that this -- these funds would be
3 subject to Title IX because of the five criteria
4 that are expressed in the report, that those --
5 that combination of factors is what makes this
6 subject to Title IX.

7 BY MR. SIEGEL:

8 Q I'm not -- I'm not talking about if the
9 model is implemented. I'm saying if the Court
10 award damages as -- plaintiffs seek damages. They
11 don't seek the conferences to actually distribute
12 the money in this way as part of a broadcast NIL
13 model. They seek damages in this lawsuit --

14 MS. CAPPS: Objection --

15 BY MR. SIEGEL:

16 Q -- for what they believe to be violations
17 of the Sherman Antitrust Act.

18 MS. CAPPS: Objection, form.

19 BY MR. SIEGEL:

20 Q Do you understand -- do you understand
21 what I'm saying?

22 MS. CAPPS: Same objection.

23 THE WITNESS: Right.

24 But, again, the schools still have to
25 comply with Title IX. By having to pay these

1 damages, they are providing payments and
2 substantial assistance in the provision of
3 payments in a way that implicates Title IX.

4 BY MR. SIEGEL:

5 Q But a Court has never held that -- like
6 you just -- you just agreed that a Court has never
7 held that the payment of a damages awarded to a
8 plaintiff has violated or implicates Title IX in
9 any way, have you?

10 A I said --

11 MS. CAPPS: Objection.

12 THE WITNESS: -- to the best of my
13 knowledge.

14 BY MR. SIEGEL:

15 Q Okay. So I'm just asking is there
16 something specifically in Title IX that talks
17 about how -- about past damages awards?

18 A No, there is not.

19 Q Okay. And you understand that in asking
20 for these damages, plaintiffs are not seeking to
21 take back scholarships or compensation from any
22 athlete in the past who already received
23 compensation from any NCAA member school
24 conference or the NCAA itself, right?

25 MS. CAPPS: Objection, form.

1 THE WITNESS: No, they are seeking to
2 provide additional funding to people who didn't
3 receive that funding in the past, which, again, in
4 every year that that would have happened, going
5 back to 2016, would have created that Title IX
6 imbalance.

7 BY MR. SIEGEL:

8 Q They're asking for damages in a lawsuit.
9 They're not asking for a broadcast model moving
10 forward of any particular form --

11 A Right.

12 Q -- or shape.

13 MS. CAPPS: Objection, form.

14 THE WITNESS: But the model says that in
15 the but-for world this is what would have happened
16 had they not had that rule.

17 And in the real world had they not had
18 that rule, those things would have been implicated
19 under Title IX.

20 BY MR. SIEGEL:

21 Q I mean, again, I just want to make sure
22 you're answering my question:

23 That all the funds that are going to
24 athletes, male or female in the past, none of that
25 money is being taken away. Plaintiffs aren't

1 seeking to take away any scholarships from anybody
2 or taking away any money or saying to any athletes
3 in any sport, "Give us back your money because we
4 made a claim in this lawsuit"?

5 MS. CAPPS: Objection, form.

6 THE WITNESS: No, they're not taking back
7 any money.

8 BY MR. SIEGEL:

9 Q What's being implicated here are the
10 profits, what -- many years later of NCAA and the
11 conferences. That's what you're defending,
12 correct?

13 MS. CAPPS: Objection, form.

14 THE WITNESS: No, that is not.

15 BY MR. SIEGEL:

16 Q No? I thought this case was about damages
17 and a lawsuit against the NCAA and the
18 conferences?

19 MS. CAPPS: Objection, form.

20 THE WITNESS: Right. This -- this is an
21 antitrust lawsuit that follows an economic model
22 that gives zero consideration to the real world
23 that schools live in which requires them to comply
24 with Title IX.
25

1 It's not -- you know, anybody could see
2 easily that if even small amounts impact athletics
3 departments negatively the kinds of amounts that
4 are in this model would have a massive impact on
5 an athletics department.

6 Q Okay. But this is not part of your
7 Title IX analysis, correct?

8 MS. CAPPS: Objection, form.
9 BY MR. SIEGEL:

10 Q This is an economic -- isn't this an
11 economic analysis of what a certain amount of
12 expenditures would -- would -- would -- what
13 impact that would have had --

14 MS. CAPPS: Objection, form.
15 BY MR. SIEGEL:

16 Q -- on athletic department budgets?

17 MS. CAPPS: Same objection.

18 THE WITNESS: No, this statement is in the
19 section that explains why this model can't be
20 adjusted to comply with Title IX. So it is a
21 Title IX analysis.

22 BY MR. SIEGEL:

23 Q It says:

24 The sheer amount of broadcast revenues
25 that would be redirected towards student-athlete

1 payments would require massive overhauls to
2 athletic programs.

3 A Yes.

4 Q So that necessarily would require looking
5 at the budgets and expenditures and resources of
6 athletic programs during the class period?

7 A Yes. And in doing a Title IX audit, you
8 regularly look at budgets and figures and all of
9 those things, but it is not an economic analysis.

10 Q You don't cite any of those Title IX
11 audits or any other analyses that you or anyone
12 else has done that comes remotely close to
13 supporting what you're saying, do you?

14 MS. CAPPS: Objection form.

15 THE WITNESS: No, I'm just applying the
16 regulations, et cetera, and showing that impact,
17 but this is my conclusion, yes.

18 BY MR. SIEGEL:

19 Q Okay. Page 53, at the top you write:

20 It would be virtually impossible to locate
21 sufficient additional funds to ensure some form of
22 compensation for female student-athletes
23 proportional to the significant amount that
24 plaintiffs contemplate for male studies -- for
25 student-athletes under the broadcast model.

1 Is that -- is that one of your expert
2 opinions in this report?

3 A It is.

4 Q Okay. Again, you did no independent
5 studies to actually support that opinion --

6 MS. CAPPS: Objection, form.

7 BY MR. SIEGEL:

8 Q -- did you?

9 A No, because --

10 MS. CAPPS: Same objection.

11 THE WITNESS: -- an independent study is
12 not necessary when you just look at the amounts
13 that are involved and how that impacts an
14 athletics department.

15 MR. SIEGEL: I'll strike that as
16 nonresponsive.

17 BY MR. SIEGEL:

18 Q In addition to no independent studies,
19 again, none of the secondary sources you cite are
20 doing any kind of analysis that would be relevant
21 to -- strike that.

22 None of the secondary sources you cite are
23 analyses of how many -- how much additional funds
24 would be needed to compensate female
25 student-athletes proportional to the amounts that

1 plaintiffs contemplate for male student-athletes
2 under the broadcast model --

3 MS. CAPPs: Objection, form.

4 BY MR. SIEGEL:

5 Q -- correct?

6 MS. CAPPs: Same objection, form.

7 THE WITNESS: Can you repeat that, please?

8 BY MR. SIEGEL:

9 Q Yeah. I'm just asking if any of these
10 secondary sources are examining the amount of
11 additional funds that are necessary to compensate
12 female student-athletes for certain levels of
13 expenditures for male student-athletes?

14 MS. CAPPs: Object to form.

15 THE WITNESS: No, none of those -- I've
16 repeated this several times, that none of those
17 studies can contemplate something that was just
18 created.

19 But on the very next page, it explains how
20 we -- you know, that from Rascher's model, there
21 are these numbers. And those numbers, I think,
22 speak for themselves in what kind of an impact
23 they would have on an athletics department.

24 BY MR. SIEGEL:

25 Q Okay. You looked at -- you looked at the

1 CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

2 I, Cynthia J. Conforti, Certified
3 Shorthand Reporter No. 084-003064, CSR, CRR, and a
4 Notary Public in and for the County of Cook, State
5 of Illinois, the officer before whom the
6 foregoing deposition was taken, do hereby certify
7 that the foregoing transcript is a true and
8 correct record of the testimony given; that said
9 testimony was taken by me stenographically and
10 thereafter reduced to typewriting under my
11 direction; that reading and signing was requested;
12 and that I am neither counsel for, related to, nor
13 employed by any of the parties to this case and
14 have no interest, financial or otherwise, in its
15 outcome.

16 IN WITNESS WHEREOF, I have hereunto set my
17 hand and affixed my notarial seal this 19th day of
18 June, 2023.

19
20 My commission expires: October 30, 2023
21

22 *Cynthia J. Conforti*
23 _____

24 Notary Public in and for the
25 State of Illinois